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Brief for the Respondents in Opposition

IN THE
Supreme Court of the United States
October Term, 1933

No. 227

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, *Petitioner,*

vs.

RICHARD F. COOPER.

No. 228

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, *Petitioner,*

vs.

BARBARA V. COOPER.

No. 229

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, *Petitioner,*

vs.

RICHARD F. COOPER AND BARBARA V. COOPER.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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Brief for Respondents in Opposition

STATEMENT

While the petitioner in these cases submits no separate brief in support of the petitions for certiorari, yet reference is made in the petition (p. 5) to the pending case of Burnett vs. Falk (No. 225), in which a supporting brief has been filed and in which authorities are reviewed.

QUESTION INVOLVED

The sole question raised in these cases is whether a beneficiary who receives the gross proceeds of oil royalties, without diminution except for administrative expense, is entitled to the benefit of depletion deduction in determining his net income and the resulting tax.

No question of allocating the tax or the depletion deduction between the respondent and the trustees is presented. The respondent is a beneficiary as to both income and capital. He is the taxpayer; the trustees are not. The question is whether depletion is allowable, at all, to anybody.

The trustees, in conformity with the provision of the trust, made information returns in which they separated the gross receipts into capital and income, by deducting the statutory depletion. The beneficiary returned the income but not the capital items. The commissioner added to the net income the capital items so deducted. The tax results from such action.

ARGUMENT

Petitioner's contention is plainly implicit, if not wholly explicit, that the interest of the beneficiary of a trust, however comprehensive and complete, is not such a property right in the subject of the trust as to justify a depletion allowance under the Statute. This contention, as applied to these cases, apparently means that the statutory depletion is only applicable to legal, as distinguished from equitable, estates.

None of the cases cited lends even color to this contention. They are cases involving capital losses or depreciation, not depletion. All of them, whether involving capital losses or depreciation, turn upon the distinction between the interest of a life tenant and that of a remainderman or reversioner and base the determination upon the fact that it is the latter interest, and not the former, which sustains the loss or the depreciation. All of them carry the plain implication that the taxpayer, upon whose interest the loss or depreciation falls, is the one who is entitled to the allowance.

There is the further obvious distinction between capital losses and depreciation, on the one hand, and depletion, on the other, that in the latter case the corpus or capital is represented and consumed pro tanto in the actual receipts, whereas, in the former case, the loss or depreciation has no direct or necessary connection with the receipts, a distinction which was pointed out, although not elaborated, in Merle-Smith vs. Commissioner, 42 Fed. (2d) 837, 841.

On the question actually presented by the record in these cases there is believed to be no conflict or uncertainty in the Court decisions. This Court, in cases directly involving the right of the taxpayer to claim depletion allowances, has indicated clearly the scope of the several statutes involved. In Lynch vs. Alworth-Stephens Co., 267 U. S. 364, 370, it was recognized that a mine lessee who had sublet the mine has such an interest in the property from which he derives income that he is entitled to the depletion allowance. The Court said:

> "The plain, clear and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to everyone whose property right and interest therein have been depleted by the extraction and disposition of the product thereof which has been mined and sold during the year for which the return and computation are made";

and, reaffirming the doctrine, in Palmer vs. Bender, 287 U. S. 551, the Court again said:

> "The language of the statute is broad enough to provide at least for every case in which the taxpayer has acquired, by investment, any interest in the oil in place and secures, by any form of legal relationship, income derived from the extraction of the oil to which he must look for the return of his capital."

Speaking especially of the effect of a trust on the right of the beneficiary of a charitable trust to claim the benefit of a tax exemption, the Court, in Lederer vs. Stockton, 260 U. S. 1, 8, said:

> "To allow the technical formality of the trust, which does not prevent the hospital from really enjoying the income [to avoid the exemption], would be to defeat the beneficient purpose of Congress."

Further, in Lynch vs. Alworth-Stephens Co., supra, considering especially what kind of interest of the taxpayer constitutes a sufficient foundation for the claim of depletion allowance, the Court said:

> "There is nothing to suggest that the word 'property' is used in any restricted sense."

In Bryan vs. Kennett, 113 U. S. 179, the Court, speaking of the property relation between a trustee and beneficiaries, said:

> "The term 'property', as applied to lands, comprehends every species of title, inchoate or complete",

and quoted, with approval, from a previous decision that:

> "By the term 'property', applied to lands, all titles are embraced, legal or equitable, perfect or imperfect."

We do not think that the question now sought to be raised in these cases, whether the interest of a beneficiary under a trust constitutes "property", is an open one in this Court, or that the proper interpretation of the depletion statutes here involved is one which this Court has not heretofore fully considered and settled.

The Courts of at least three of the circuits have specifically upheld the right of the beneficiary, entitled, as are the respondents, to participate in both corpus and income, to take deduction allowance for depletion.

Merle-Smith vs. Commissioner, 42 Fed. (2d) 837 (C. C. A. 2; Certiorari denied 282 U. S. 897)

Falk vs. Commissioner, 64 Fed. (2d) 171 (C. C. A. 7)

Cooper vs. Reynolds, 60 Fed. (2d) 650

Reynolds vs. Cooper, 64 Fed. (2d) 644 (C. C. A. 10)

Commissioner vs. Molter, 60 Fed. (2d) 498, 499 (C. C. A. 10)

The Board of Tax Appeals, in recent cases, follows the same rule.

Alphin vs. Commissioner, 21 B. T. A. 1101

Kuhn vs. Commissioner, 24 B. T. A. 216

The Bureau of Internal Revenue seems now to recognize the same rule.

C. B. X-2, 353 (G. C. M. 9804)

C. B. XI-1, 169 (G. C. M. 10,273).

Prior to the Revenue Act of 1928, (Sec. 23 (1), 45 Stat. 800), the Bureau of Internal Revenue, whether properly or improperly, apparently treated depletion as a deduction wholly concerning the *capital* owner or beneficiary. The Act of 1928 definitely allocated depletion to the *income* owner or beneficiary, evidently under the doctrine governing "opened" mines. Where, as in the present cases, the beneficial ownership of both capital and income is united, no question of allocation can arise either under the old or the new enactments.

In view of the unanimity of the Courts on the substantive question here actually involved and the number, variety and cogency of application made by them of the principle declared and thus established, it is submitted that these cases do not call for further review by this Court.

Respectfully submitted,

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